

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

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MARTINEZ S. AYTCH,

Plaintiff,

vs.

G. CARPENTER et al.,

Defendants.

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3:15-cv-00623-RCJ-VPC

**ORDER**

This prisoner civil rights complaint under 42 U.S.C. § 1983 arises out of allegedly inadequate dental care. The Court now screens the Complaint under 28 U.S.C. § 1915A.

**I. SCREENING STANDARDS**

**A. Merits of Claims**

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *See id.* § 1915A(b)(1)–(2). Dismissal of a complaint for failure to state a claim upon which relief can be granted is provided for in Federal Rule 12(b)(6), and the court applies the same standard under § 1915A. *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 2012). When a court dismisses a complaint

1 upon screening, the plaintiff should be given leave to amend the complaint with directions as to  
2 curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could  
3 not be cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

4 Finally, all or part of a complaint filed by a prisoner may be dismissed *sua sponte* if the  
5 prisoner's claims lack an arguable basis in law or in fact. This includes claims based on legal  
6 conclusions that are untenable, e.g., claims against defendants who are immune from suit or  
7 claims of infringement of a legal interest which clearly does not exist, as well as claims based on  
8 fanciful factual allegations, e.g., fantastic or delusional scenarios. *See Neitzke v. Williams*, 490  
9 U.S. 319, 327–28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

#### 10 **B. Exhaustion of Administrative Remedies**

11 “The Prison Litigation Reform Act requires that a prisoner exhaust available  
12 administrative remedies before bringing a federal action concerning prison conditions.” *Griffin v.*  
13 *Arpaio*, 557 F.3d 1117, 1119 (9th Cir. 2009) (citing 42 U.S.C. § 1997e(a)). A prison system's  
14 own requirements “define the boundaries of proper exhaustion.” *Jones v. Bock*, 549 U.S. 199,  
15 218 (2007).

16 Although once within the discretion of the district court, the exhaustion of administrative  
17 remedies is now mandatory. *Booth v. C.O. Churner*, 532 U.S. 731 (2001). Those remedies “need  
18 not meet federal standards, nor must they be ‘plain, speedy, and effective.’” *Porter v. Nussle*,  
19 534 U.S. 516, 524 (2002) (citing *Booth*, 532 U.S. at 739–40 n.5). Even when the prisoner seeks  
20 remedies not available in the administrative proceedings, notably money damages, exhaustion is  
21 still required prior to filing suit. *Booth*, 532 U.S. at 741. The Supreme Court has strictly  
22 construed section 1997e(a). *Id.* at 741 n.6 (“We will not read futility or other exceptions into  
23 statutory exhaustion requirements where Congress has provided otherwise.”).

1 The failure to exhaust administrative remedies as required by § 1997e(a) is an affirmative  
2 defense, and a defendant bears the burden of raising and proving that the plaintiff has not  
3 exhausted. *Jones v. Bock*, 549 U.S. 199, 216 (2007). However, if the affirmative defense of non-  
4 exhaustion appears on the face of the complaint, a defendant need not provide evidence showing  
5 non-exhaustion. *Id.* at 215; *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 902 (9th Cir. 2013).  
6 Where an affirmative defense does not appear on the face of the pleading sought to be dismissed,  
7 it cannot be determined until (at least) the summary judgment stage; it cannot be treated as a  
8 quasi-summary-judgment matter under Rule 12(b). *Albino v. Baca*, 747 F.3d 1162, 1168–69 (9th  
9 Cir. 2014) (en banc) (overruling *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003)).

## 10 **II. ANALYSIS**

11 The Court dismisses the Complaint without prejudice because the affirmative defense of  
12 non-exhaustion appears on the face of the Complaint. The Nevada Department of Corrections  
13 (“NDOC”) utilizes a three-stage grievance procedure: an informal grievance, a first level  
14 grievance, and a second level grievance. *See* NDOC Admin. Reg. 740 (Inmate Grievance  
15 Procedure), at 4–9, available at [http://doc.nv.gov/uploadedFiles/docnv.gov/content/About/  
16 Administrative\\_Regulations/AR%20740%20-%20091614.pdf](http://doc.nv.gov/uploadedFiles/docnv.gov/content/About/Administrative_Regulations/AR%20740%20-%20091614.pdf). Plaintiff alleges that he filed an  
17 informal grievance on October 15, 2015 based on his tooth pain. (Compl. 3A, ECF No. 1-1). He  
18 filed a first level grievance on December 2, 2015, approximately 60 days later, because he had  
19 received no answer to his informal grievance. (*Id.* 3A–3B).<sup>1</sup> Plaintiff signed the Complaint on  
20 December 23, 2015 and filed it on December 28, 2015, having received no answer to his first  
21 level grievance. (*Id.* 3B, 9). It is therefore clear on the face of the Complaint that Plaintiff has  
22 not exhausted his administrative remedies. The response to Plaintiff’s first level grievance was  
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24 <sup>1</sup> A response to an informal grievance is due within 45 days. *See* NDOC Admin. Reg. 740 at 7.

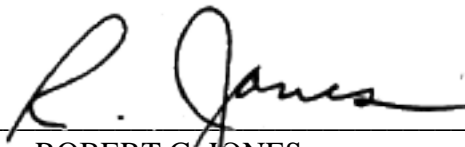
1 not due until January 16, 2016, weeks after he filed the Complaint.<sup>2</sup> Plaintiff has not alleged  
2 having filed a second level grievance, and he cannot have done so consistent with the allegations  
3 elsewhere in the Complaint, because he alleges that he received no response to the first level  
4 grievance as of the filing of the Complaint, which was before any response was due.

5 **CONCLUSION**

6 IT IS HEREBY ORDERED that the Application to Proceed in Forma Pauperis (ECF No.  
7 4) is DENIED as moot, and the Complaint is DISMISSED without prejudice.

8 IT IS FURTHER ORDERED that the Clerk shall enter judgment and close the case.

9 Dated: This 14th day of June, 2016.

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12 ROBERT C. JONES  
13 United States District Judge  
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2 A response to a first level grievance is due within 45 days. *See* NDOC Admin. Reg. 740 at 8.